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# Mediation and Domestic Violence: Theoretical Reflection on the Polish Background

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## Abstract

*The use of mediation in criminal cases involving domestic violence is the subject of controversy. The United Nations Department of Economic and Social Affairs even suggests that mediation should be prohibited in such cases. Domestic violence is defined as a pattern of behavior designed to control an intimate partner, and consequently, the trust, good faith and transparency necessary for mediation are likely to be missing. On the other hand, supporters of restorative justice point to the beneficial effects of properly conducted mediation on the relationship between the parties, psychological strengthening of the victim and rehabilitation of the perpetrator. In this article, we present the advantages and disadvantages of mediation in cases of domestic violence. We come to the conclusion that, in general, mediation in such matters should be allowed, although it bears certain risks and requires mindfulness. The risk is dramatically higher when domestic violence affects a child. The relative admissibility of mediation in cases of domestic violence should not automatically include situations in which a child is a victim. In cases where a child becomes victim to domestic violence, mediation should in fact be forbidden. Even if the regulations do not expressly provide for such a prohibition, we attempt to show in this article that mediation with a battered child is unacceptable.*

Keywords: Domestic Violence, Mediation in Criminal Cases, Restorative Justice, Victim-Offender Mediation, Violence Against Children, Violence Against Women.

## Introduction – the Phenomenon of Domestic Violence

Violence is a major social issue affecting vast areas of life of many people across the world. In science, the term violence is used to denote all non-accidental acts infringing upon the personal freedom of the individual, or causing physical or psychological harm, which deviate from the established social norms regarding relations (Pospiszyl, 1994, p. 14). In a broad range of offences, violence is intentional and consists in such use of

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physical measures as to prevent or break resistance of the person being coerced (Hanausek, 1966, p. 65). Nonetheless, in daily life perpetrators generally do not resort to violence to achieve a short-term goal, such as the seizure of a specific object or coercing another person into doing something. Instead, their aim is to inflict pain and suffering, in particular when the victim is closely related to them.

A disturbing aspect of this phenomenon is domestic violence, which involves undertaking activities with the use of force, advantage, or power in order to hurt family members (Pilszyk, 2007, p. 828). In other words, it consists in deliberate action based on the imbalance of power, directed against a family member and causing suffering and damage (Płatek, 2007–2008, p. 601). Given its significance, this problem has been repeatedly discussed at the international level. In 1986, the Council of Europe defined violence in the family as any act or omission committed within the framework of the family by one of its members that undermines the life, the bodily or psychological integrity, or liberty of another member of the same family or that seriously harms the development of his or her personality (Council of Europe materials).

Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 11 May 2011) defines domestic violence as all acts of physical, sexual, psychological, or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim. In our opinion, the absence of the requirement to share the same residence, as highlighted in this definition, should be regarded as controversial. Although the definition of domestic violence does not have to include the concept of ‘the closest person’, which in the Polish Criminal Code relates to the degree of consanguinity or relatedness, it appears that in defining the notion of domestic violence it is difficult to depart from the requirement of shared residence. The underlying idea behind listing this type of unlawful acts separately is that perpetrators commit acts of aggression against their relatives under the same roof and in the privacy of home, thus making it harder to detect the problem from the outside.

Given the constant coexistence with the abuser, the victims may indeed develop an addiction to the wrongdoer and, most certainly, they constantly fear for their safety, as home is no longer a friendly place where one can rest, gain strength, or receive support and understanding. Fear, depression, intense anxiety, and social isolation are fairly common among battered women, and the collateral damage that follows from domestic violence extends beyond the individual suffering of the victim (Norwood *et al.*, 2004, pp. II-8-3). Moreover, the problem is prevalent: domestic violence encompasses all genders, races, ages, and sexual orientations (Alejo, 2014, p. 83). While it may appear to concern predominantly the poor and uneducated, it in fact affects all layers of society, albeit to varying degrees and with a diverse array of acts of aggression.

Domestic violence is by no means incidental and it usually recurs according to the following pattern: the tension-building phase, during which aggression begins to appear; the acute battering phase, during which aggression erupts; and the honeymoon phase, when the abuser apologizes and promises to change (Spurek, 2012, p. 17). The variation in behavior of the abuser, who in particular during the honeymoon phase may be perceived as a loving spouse by the local community, makes it more difficult for the community to identify the problem. Domestic violence is marked by its long-term nature, hence over time victims tend to erase the memories of the battering behavior of the abuser, their painful memories ultimately fade and cease to be so negative. Nonetheless,

violence exerts a devastating long-term impact on the victim leading to far-reaching social consequences. For instance, children of battered women are at high risk of being victimized, suffering significant emotional and behavioral maladjustment, and perpetuating violence in their own interpersonal relationships (Norwood *et al.*, 2004, pp. II-8-3).

Domestic violence may be caused by a number of factors. Although statistics show that abusers tend to be predominantly men, usually under the influence of alcohol (Zięba & Paluch, 2014, pp. 176-177), this does not adequately explain why they are abusive. For instance, it is known that addictions and the abuse of recreational drugs are not intrinsic causes of violence in the family; instead, they are merely elements of a set of conditions and provide justification for a cause that is inside a person (Browne & Herbert, 1999, pp. 50-53). Researchers disagree as to the cause of domestic violence: some believe that alcoholism of one or both parents is a contributing factor (Kocur & Rzeźniczak, 2002, pp. 45-49), while others point to poor material conditions, decreased intellectual abilities, and emotional disorders (Dymowska, 1997). Association of domestic violence with the male sex is due to the fact that men tend to have difficulty in expressing deep emotional problems in a peaceful manner (Marzec-Holka, 1999). In addition, experiencing violence as a child constitutes another relevant factor to be taken into account (Tucholska, 2002, pp. 34-38). It should be noted, though, that it is not an accurate indicator of violence in adult life, since not every victim becomes a perpetrator but every perpetrator used to be a victim (Pilszyk, 2007, p. 831).

In the long-term perspective, the perpetrator's abusive behavior towards his family is not the only manifestation of his anti-social behavior. Research efforts were made to determine whether domestic violence as it typically occurs in the community may be associated with other deviant acts in a manner that is consistent with a general deviance explanation of domestic violence. The results indicate that most of the men who had engaged in domestic violence (76 percent) also reported engaging concurrently in one or more other deviant acts (Norwood *et al.*, 2004, pp. II-8-7).

Concealing violence within the family circle means that the problem is shamefully kept closed within four walls. Victims of domestic violence reveal that they are being subjected to abuse only when pushed to the edge of their physical and emotional endurance, and when they fear for their own life and health, or that of their dear ones (Pilszyk, 2007, p. 829). At such a critical moment the problems a family beset by abuse faces reach such a degree of intensity that the victims can no longer cope on their own. Violence in the family is deeply concealed; it is a problem that in many countries is only discussed reluctantly, belittled, or is not acknowledged at all, which mainly stems from the fear that disclosing it may be harmful to the coherence of the family unit (United Nations, 1993). However, the frequent necessity to continue sharing residence with the abuser demands that the conflict be fully resolved, instead of being dismissed or temporarily reduced by means of imposition of a penalty or other restrictions. In view of the above, the need for mediation in such cases is increasingly acknowledged.

### **Victim-Offender Mediation in Cases involving Domestic Violence**

Domestic violence may be the subject of both family mediation (which may concern divorce settlements, arrangements for the children, or even division of shared estate) and victim-offender mediation. In Poland, domestic violence is usually handled by mediators in criminal cases. We shall not focus here on an evaluation of whether a given case (in

particular a civil one) involves domestic violence. With this in mind, it should be remembered that in both civil/family cases and criminal cases domestic violence may lie behind other issues that have been identified and are being actively addressed. For instance, a maintenance case (failure to pay maintenance constitutes an offence under Polish law) may involve abuse perpetrated by a spouse.

The first important issue related to the possibility of using mediation in cases of domestic violence is to establish the relevance of conciliatory solutions to different types of criminal cases. In the case of domestic violence, the critical foundational requirements of mediation may not be present. Given the fact that domestic violence is defined as a pattern of behavior designed to control an intimate partner, the trust, good faith and transparency necessary for mediation are likely to be missing. The victim's memory of past events and her fears of continued or retaliatory violence may severely limit her ability to negotiate (Lowe & Abrams, 2011, p. 9).

It should be stressed that pursuant to the provisions of Polish criminal law, mediation may be carried out in all cases. The severity of the offence, type of the infringed interest, or the special relationship between the offender and the victim may not remain formal obstacles to conducting mediation. But on the basis of long-standing practice, international documents and the literature on the subject establish lists of offences for which mediation cannot be used (e.g. organized crime, terrorism, or vocational crime). Clearly, one of the most controversial issues is the use of mediation between the victim and the perpetrator of domestic violence. The United Nations Department of Economic and Social Affairs explicitly suggests that mediation in such cases should be prohibited ("Handbook for Legislation", 2009, p. 38). This solution remains in force e.g. in Spain (Organic Act 1/2004 of 28 December on Integrated Protection Measures against Gender Violence).

In contrast, as statistics in Poland show, proceedings concerning Article 207 of the Criminal Code (abuse) account for the majority of cases submitted for mediation (Hansen, 2006; Skrobotowicz, 2014). It should be recalled that pursuant to Article 48 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention. At the same time, an auxiliary document mentions that "The domestic law of many Council of Europe member states provides for alternative dispute resolution processes and sentencing – in criminal and in civil law. In particular, in family law, methods of resolving disputes alternative to judicial decisions are considered to better serve family relations and to result in more durable dispute resolution. In some legal systems, alternative dispute resolution processes or sentencing such as mediation or conciliation are also used in criminal law. While the drafters do not question the advantages these alternative methods present in many criminal and civil law cases, they wish to emphasise the negative effects these can have in cases of violence covered by the scope of this Convention, in particular if participation in such alternative dispute resolution methods is mandatory and replaces adversarial court proceedings.

Victims of such violence can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator. It is in the nature of such offences that such victims are invariably left with a feeling of shame, helplessness and vulnerability, while the

perpetrator exudes a sense of power and dominance. To avoid the re-privatisation of domestic violence and violence against women and to enable the victim to seek justice, it is the responsibility of the state to provide access to adversarial court proceedings presided over by a neutral judge and which are carried out based on the national laws in force. Consequently, paragraph 1 requires Parties to prohibit in domestic criminal and civil law the mandatory participation in any alternative dispute resolution processes” (Explanatory Report, 2011). It appears that the aforementioned prohibition is crucially important for the legal systems where mediation is an actual alternative to criminal proceedings. A similar argument, although less severe, should be formulated when mediation is incorporated into criminal proceedings conducted by a prosecutor, and then before the court (as is the case in Polish law).

In their definition of violence, psychologists highlight the abuser's dominance over the victim: economical, psychological, and physical dominance (Błachut *et al.*, 2001, pp. 259–266). Victims of domestic violence often suffer from the learned helplessness syndrome (Walker, 1980, pp. 42–54) and posttraumatic stress disorder (Lipowska-Teutsch, 1998, pp. 49–50). It is also mentioned that reactions to the feelings of powerlessness are very strong in battered women. Their feelings may include insecurity, guilt, anger, resentment, exhaustion, hopelessness, inferiority, shame, incompetence, and helplessness. They may also harbor negative feelings such as fear, pain, depression, and self-hatred (Vestal, 2007).

The conditions outlined above render the victim defenseless or even incapable of taking advantage of the assistance provided to her. Low self-esteem does not let her freely express her opinions or articulate her needs. A person suffering from these syndromes is not able – as the literature indicates – to take part in mediation as an equal discussion partner. It follows that in such situations it is legitimate that both parties be referred to therapy, which may precede mediation (Cordes, 1995, p. 187; Wójcik, 2010a, p. 1026), although mediation cannot serve as a substitute for sessions with a psychologist. Moreover, the commonly held belief that both parties are always to blame for a conflict within the family poses an additional risk for the victim (Grillo, 1991). If the victim assumes co-responsibility for the violence inflicted on her and experiences feelings of unjustified guilt, injustice or even more grievance, then the perpetrator may feel he will escape punishment. Focusing on the future, which helps to solve the conflict, may at the same time lead to belittling violence and rationalizing its causes (Gójska & Huryn, 2007, pp. 205–207). It should also be noted in this context that a badly conducted mediation may in fact intensify the consequences of domestic violence and reinforce negative behavior (Wójcik, 2010a, pp. 1025–1026).

Given the above, a view is expressed that the dynamics of coercive control and the necessary building blocks of successful mediation are in opposition to one another and are likely to prevent even the most skilled mediator from achieving success. Domestic violence can be reduced as long as there is certainty as to the enforcement of domestic violence laws and batterers are held accountable for violations of protection orders and parenting time provisions (Lowe & Abrams, 2011).

In the light of Polish regulations, one compelling reason against mediation in cases involving violence, in particular domestic violence, is a substantial lack of control over the implementation of the settlement. The mediator, although obliged by the legislator to determine whether the parties have fulfilled their obligations (§ 14 of the Regulation of the Minister of Justice of 7 May 2015 on Mediation in Criminal Cases), does not have

reliable tools to do that. In addition, Polish law essentially does not envisage any consequences of not complying with the terms of the settlement. In many cases, victims of different types of violence continue sharing residence with the perpetrator, or live in the neighborhood, which entails a risk of recurrence of infringements.

In the case of domestic violence, the dark figure of crime is relatively high, as victims are unwilling to inform law enforcement authorities about abuse. Therefore, if a battered woman or man reports to the police that her or his partner has been abusive towards them, it means that she or he sees no alternative to remedying the situation by way of a criminal court judgment.

A separate issue that the Polish judiciary practice has to deal with is spouses who bring criminal charges for the purpose of divorce proceedings. In such cases, there is a high risk that either there was no violence whatsoever, or that criminal case mediation will become a manipulation tool. We should not lose sight of the fact that criminal cases involving violence are often heard after divorce or break-up has taken place. In this case, the fear of yet another victimization (which is only natural if the parties share residence) is much less frequent. A blanket ban on mediation in domestic violence cases would deprive ex-spouses of a great opportunity to build good relations after the split-up.

Nevertheless, the proponents of restorative justice point to the beneficial influence of a properly handled mediation on the relationship between the parties, psychological strengthening of the victim and rehabilitation of the offender (Sitarska, 2006, pp. 56-74; Wójcik, 2010a, pp. 1017-1032). They emphasize that the risks of mediation in cases involving violence are not higher than those connected with participation in court proceedings (Gójska & Huryn, 2007, pp. 208-209). Voluntariness and confidentiality mean that mediation makes it possible to achieve what seems virtually unattainable in court proceedings – dispute resolution. However, the mediator must ensure that the victim participates in mediation because she genuinely wishes to, and not because she merely consented to the demand made by the perpetrator. It could also be added that mediation is often the path that the victim did not see before, as they were unaware of the existence of such an opportunity.

Moreover, it is of utmost importance that victims of domestic violence actively participate in shaping the settlement and, what follows in Polish conditions, the court judgment. Similarly, the perpetrator should apologize, express genuine remorse and voluntarily undertake to cease to resort to any form of violence.

It is hard to disagree with the view that in the case of domestic violence, mediation can lead to success if the abuser ceases to exert coercive control over the victim. This may be due to the batterer completing a batterer's intervention program or accepting responsibility and changing his behavior. Some mediators require pre-mediation conferences, domestic abuse screening, mediation statements, evidentiary materials, and a significant time commitment to the process (Lowe & Abrams, 2011, p. 9). Regrettably, such practices have not been adopted in Poland where only indirect mediation is allowed, with a view to easing the victim's discomfort connected with meeting with the abuser. Another tool used in Poland in this respect is a private meeting during mediation, which makes it possible to present one's position or share experiences without the presence of the other party. The shortcomings indicated above may stem the fact that there are no trainings for mediators dedicated to the issue of domestic violence and reactions to this problem in the form of consensual solutions. As different authors have observed, mediators

who have never experienced such a type of abuse on an interpersonal level, or who have not been properly trained to identify and cope with domestic violence, may have difficulty in understanding or believing what they hear from either or both partners. The most perplexing question for those who have never been exposed to such abuse is “why didn't she leave if it was really that bad?”

The literature on the subject offers a review of the conditions for mediation in cases involving violence (Lowe & Abrams, 2011, pp. 10–11; Vestal, 2007). It is pointed out that the general category labeled as “violence” fails to reflect the complexity of the problem, and that it is vital that a party to mediation should be able to negotiate and remain composed (Irving & Benjamin, 1995; Pearson, 1997, pp. 319–335). Regardless of the differing views, all authors agree that it is an extremely delicate matter and as such requires considerable efforts and skills on the part of the mediator.

It appears that the primary task of the mediator in domestic violence cases (in addition to identification of the problem) is restoring the relative balance between the parties. If this can be achieved – mediation can proceed. Only if the balance in the relations between the parties is maintained can we speak of full voluntariness of participation in mediation. In contrast, a clear sustained imbalance in relations between the partners makes it completely impossible to conduct mediation whose purpose is, after all, the resolution of a conflict. Whenever the balance is achieved, the settlement appears to be consensual and the legal and quasi-legal instruments are in fact overused. In the light of the information presented in the introduction to this article, it is also essential that the mediator be aware of how the so-called cycle of violence works. This is important since mediation conducted during the “honeymoon phase” will result in an apparent resolution of the conflict which will flare up again in the consecutive cycle (after the tension building phase).

In the USA, as mediation of family disputes has become more widespread and institutionalized through court programs, practitioners and academics have recognized the need to develop standards for high quality and ethical practice in this area. As a result, the American Bar Association Section of Family Law (ABA) and the Association of Family and Conciliation Courts (AFCC) collaborated with a wide range of individuals and professional organizations to develop what became the *Model Standards of Practice for Family and Divorce Mediation* (Murphy & Rubinson, 2005, pp. 59). While these *Standards* concern family cases, they do take into account domestic violence.

It should be emphasized that the reservations and doubts expressed herein concern violence between adult partners. The risks are distinctly higher when domestic violence affects a child. The relative admissibility of mediation in cases involving violence in the family should not automatically include situations in which a child is a victim (i.e. a person from the moment of their birth until they reach the age of 18). This specific situation should be analyzed separately.

### **Victim-Offender Mediation in Cases Involving Violence against Child**

Under the provisions governing criminal procedure in Poland, a victim of a prohibited act who is a minor, as a rule, has the status of the injured party. Pursuant to Article 51 of the Code of Criminal Procedure, if the injured party is a minor, his or her rights are exercised by his or her legal representative or by an individual who has custody of the injured person. If the party accused of domestic violence is simultaneously the legal representative of the victim, it is obvious that he or she cannot represent the child's



interests in criminal proceedings. In such situations it is necessary for the court to appoint a guardian. The question thus arises whether this kind of representative is eligible to reconcile with the abuser on behalf of a battered child, or should he or she be eligible to do so.

Reconciliation is a central element of mediation, including victim-offender mediation. However, reconciliation is not the only objective of mediation, and cannot be pursued at all costs. From the victimologist point of view, the needs and expectations of the injured party are of utmost importance. Mediation satisfies his or her psychological needs – it makes it possible for him or her to present their own account of what happened, which in turn helps them to recover from tension and express anger. Mediation helps the injured party understand why he or she became the victim, and provides them with an opportunity to hear the abuser admit his guilt and apologize. Last but not least, mediation makes it possible for the victim to forgive the perpetrator (Chlebowicz, 2008, pp. 74-79). At this point, an assumption must be made that although such a construction is known to lawyers, one cannot forgive someone "on behalf of someone" or "for someone", "forgiveness cannot be expressed by a substitute" (Hughes, 2000, p. 460). Likewise, potential reconciliation is personal in nature. Therefore, as a rule, neither the guardian nor parent can reconcile with the perpetrator on behalf of the child (Sitarz & Bek, 2014, pp. 133-139). It appears that such legal representatives can only leave it for the child to make the decision or assist him or her in making it. It is important to mention that the Polish Supreme Court expressed a different opinion on this issue in its resolution of 20 June 2012, I KZP 9/12.

The personal nature of reconciliation makes it necessary for the injured party to participate in mediation, if any mediation is to take place at all. It should be asked whether a child is capable of formulating his or her view on such a difficult matter, and if so, when he or she is able to do so. This may be labeled as the "ability to forgive" (Hughes, 2000, p. 468). While arguments in this regard have been formulated in civil law, they may as well be used in the context of victim-offender mediation. Accordingly, it is stressed that,

in the first place, forgiveness does not have to have a special form, and secondly, it is not necessary for the person forgiving to know the legal consequences of forgiveness and intend to produce them. Most importantly, however, it is not necessary for the person forgiving to enjoy legal capacity (Klubińska, 2014, pp. 177-178).

Nevertheless, the Civil Code requires that the person granting forgiveness should act with sufficient awareness. It is emphasized in the literature on the subject that it is necessary that the actual and consciously expressed willingness to forgive exists, and that the awareness must encompass both the conduct of the other party and the very intention of granting forgiveness (Safjan, 2013, p. 695). The Code requires that the person granting forgiveness have knowledge on the circumstances that may be important for the forgiveness and that they be able to carry out a reasonable assessment thereof (Księżak, 2006, p. 59).

Similar views are expressed in Recommendation No. R(99)19 adopted by the Committee of Ministers of the Council of Europe on 15 September 1999. Point 13 of the Recommendation holds that mediation should not proceed if any of the main parties is not capable of understanding the meaning of the process. Pursuant to point 15, authorities referring a case to mediation should take into consideration the obvious disparities

between the parties, including their age, maturity, or intellectual capacity. In essence, acceptance of these assertions calls into question the adequacy of conducting mediation with an underage victim, or even entirely excludes it.

The regulations concerning mediation in cases involving minors (when the perpetrator is under 17 years of age) make an explicit reference to the possibility of conducting mediation with an underage victim (in the presence of a parent). However, this is an exceptional situation. As a rule, the (underage) perpetrator is at most several years older than the victim, and there is usually no emotional dependence between the parties (§10 of the Regulation of the Minister of Justice of 3 August 2001 on the organization and scope of activity of diagnostic and consultation centers). In this type of mediation, the parent is present to support the child – they are on the same side. In other cases, Polish law is very cautious about allowing a minor to participate in the proceedings and seldom gives full legal meaning to his or her wishes. For instance, in cases involving domestic violence, testimony of a victim who at the moment of the examination has not reached the age of 15 is collected in a special process in the presence of an expert psychologist (Kosonoga, 2004). At the same time, child development psychology has made it possible to formulate, in informal regulations, standards for examining a child, account being taken of his or her capacity to perceive, remember, reconstruct, and interpret (Kwiatkowska-Darul, 2007; Kornak, 2009). Furthermore, it is firmly believed that a child should have to face a confrontation only as the last resort, and only with a child of the same or similar age representing a similar level of physical and psychological development. Confronting minors with both adults and older children is to be avoided at all costs, or even prevented, as both cases involve a risk of a conscious or subconscious attempt to exert influence. Lastly, a confrontation between an underage witness and a suspect or the accused is completely unacceptable (Kornak, 2009, pp. 267–274).

The doubts regarding the examination of an underage witness and restrictions with respect to confrontation are very serious. The question then arises whether all the aforementioned reservations should be reflected in the mediation procedure. Should the provisions of law impose a limit on the use of mediation in cases involving an underage injured party? From the procedural point of view, an examination of an underage victim appears necessary, in particular if he or she is the only witness of a crime. In contrast to the examination, reconciliation is not necessary. As early as 1924, J. Bossowski argued that children up to a certain age should not testify due to their naiveté in interpretation of various life situations and unlimited risk of suggestibility (Bossowski, 1924, p. 124). If we emphasize mental immaturity of an underage witness, how can we regard his or her act of forgiveness, which is the basis of reconciliation, as mature? Consideration must be taken of the fact that a child's poor critical evaluation skills and a deeply held conviction that adults are superior leave children highly vulnerable to suggestions made by adults. Children are indeed incredibly prone to suggestion – both conscious and unconscious – their level of suggestibility is so high that they may not be able to correctly identify what is and what is not true. A child's knowledge is extremely egocentric in nature. Children construct the world from their own perspective, and easily take in contradictory information (Debesse, 2010, p. 1107; Birch, Malim, 1997, pp. 130–132; Kornak, 2009, pp. 170–180). Paradoxically, children who are battered by their parents become closely dependent on them and get addicted to them (Pospiszyl, 2007, 144). We must also not forget that a child is a special victim of a crime, in particular if the perpetrator is someone close to them. S.

Forward even goes on to claim that a child does not always have to forgive his or her parents, and speaks of the forgiveness trap as a victimogeneous situation (Forward, 1994, pp. 137-140).

Apart from the child's age, a special relationship between the perpetrator and the victim provides another valid reason against involving children in mediation. Clearly, the principles on which mediation is based are intended to facilitate authentic understanding between the offender and the victim. Of the numerous underlying principles of restorative justice, with mediation as one of its forms, the principle of voluntariness (Płatek, 2007-2008, p. 20; Wójcik, 2010b, p. 356; Sitarska, 2006, p. 62-63) is the first to be mentioned. The Polish Code of Criminal Procedure also makes the decision to refer a case to mediation dependent on the initiative or consent of the injured party and the accused (Article 23a § 1). The principle of voluntariness is inherently connected with the principle of equal position of the parties, which also applies to mediation. One party's domination over the other one carries the risk of a lack of independence when a decision to participate in mediation is made and creates unease during the mediation proceedings. Regrettably, such disparities between the parties also increase the risk of forcing a settlement – this problem is prominent in particular in domestic violence cases (Wójcik, 2010b, p. 356; Kulesza, 1995, p. 50, D. Wójcik, 2010a, p. 1025). Yet, it is commonly accepted that the greatest value of mediation is the fact that the parties themselves – and not the mediator – make the decision.

Psychology unequivocally demonstrates that a child is dependent on his or her parents, and – as stated above – the dependence is even stronger if the child is a victim of violence. The special relationship between parents and a child has, for instance, become the cause for evidentiary limitations in matrimonial proceedings. Pursuant to provisions of Article 430 of the Polish Civil Procedure Code, minors under 13 years of age, and descendants of the parties under 17 years of age, cannot be examined as witnesses. As the commentaries stress, the provision is intended to protect minor children against the results of examinations in matrimonial matters in which facts that are drastic and stressful for children are frequently revealed (Ereciński, 2009, p. 488), possibly causing traumatic experiences for the children involved in the proceedings (Dąbrowska, 2012, p. 298). These prohibitions are absolute and may not be lifted, the parties may not demand that such minors be examined and such examinations may not be conducted either of the parties' own volition or of the court's volition (Ereciński, 2009, p. 488; Dąbrowska, 2012, p. 298).

Given the above, there should be no doubt that there is no balance in the relationship between the parent and his or her child, in particular a battered one. Therefore, a question arises as to whether the mediator in such cases can actually create this balance. Sitarska maintains that mediation eliminates the perpetrator's advantage over the victim, which seems to be a double misapprehension (Sitarska, 2006, p. 63). First of all, mediation does not eliminate the imbalance, as it is not its role or objective (mediation must be conducted while maintaining the balance between the parties). Secondly, the relationship between the perpetrator and the victim does not automatically determine the direction of imbalance (the perpetrator does not always hold an advantage over the victim). In the case of domestic violence, the victim is usually physically and psychologically weaker than the perpetrator, but his or her strength in the dispute may be derived from other sources, such as community support, moral strength, or the possibility to block talks (Gójska & Huryn,

2007, pp. 198–199). It is doubtful, though, that these may significantly strengthen the position of the child victim.

We should therefore once again refer to point 15 of the aforementioned Recommendation No. R(99)19 of the Committee of Ministers to Member States concerning mediation in penal matters. In accordance with its wording, authorities referring a case to mediation should take into consideration obvious disparities between the parties, including their age, maturity, or intellectual capacity. Whenever such disparities exist, mediation is not a good choice. As pointed out in the commentary, one example of such a situation is the imbalance of powers that results from one party being dependent on the other one. According to E. Bieńkowska, mediation should not proceed if the party's psychological development makes it impossible for them to understand the nature and sense of mediation; the same applies when the victim is a small child, in particular one who is a victim of sexual offences (Bieńkowska, 2009, p. 43). However, this assertion should be even more severe – mediation between younger children (as victims) and their parents (as perpetrators) should not be admissible.

### **Conclusion**

Numerous and serious reservations against mediation involving a minor do not mean that the only legitimate reaction to a crime against a child is a severe punishment. Criminal law offers a whole gamut of measures with a varying degree of severity. The decision to apply the more lenient ones, however, should be contingent on undergoing therapy and successfully changing the relationship between the parents and the child, as confirmed by a psychological opinion. It is rightly emphasized in the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice that alternative (preventive) methods cannot be an obstacle to the child's access to justice through court proceedings (“Guidelines of the Committee” 2010, point B.24, p. 25 and explanatory memorandum B.82 and 83, pp. 72–73).

Beyond any doubt, the resolution of a conflict is the best thing that can be done for the child (Woźniak-Bahr, 2009, p. 58) and the child's interest should be the only condition for referring a case to mediation. It is indeed difficult for us to agree with the position presented by A. Z. Krawiec (2012, pp. 210–211) who believes that the admissibility of mediation involving a child is primarily justified by the benefits to be obtained above all by the perpetrator, whereas as regards the child, mediation shortens the main proceedings, eliminates activities that expose the child to the risk of secondary victimization, and – last but not least – helps to repair the relations between the child and the perpetrator (family member). However, the special psychophysical construction of the child as well as his or her vulnerability to harm mean that mediation should be approached with great caution, with due account to be given to the possibility of secondary victimization and manipulation of the child by the other party involved in mediation. Given the above, a question arises as to whether the mediator is actually able to resolve a conflict without the support of a psychologist if, for instance, the conflict involved many years of abuse of the child (physical, emotional, sexual, or economic). More importantly, who should answer this question – the parties, the mediator, court, or perhaps the legislator by way of prohibiting mediation in specific cases when one of the parties is a child (or at least by establishing specific conditions for conducting mediation in such cases)?

Mediation involving children certainly requires a special legislative form – establishing the minimum age of a child involved in mediation, expert training of competent mediators and special form of mediation proceedings, taking into account the specific needs of the child. According to R. J. Havighurts' developmental tasks theory, establishing emotional independence from parents takes place at the ages of 12-18 (Stanik, 2013, p. 53). Furthermore, regulations should contain an express reservation that settlement, reconciliation, and forgiveness cannot take place against the child's will; even when, in the opinion of the child's guardian, reconciliation will be a better solution than continuing living with the feeling of having been wronged. The child's opinion should be clearly indicated in the settlement.

Certainly, we cannot agree with the assertion included in the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice that mandatory referral to mediation services, prior to court procedures, could also be considered: this is not to force people to mediate (which would be contradictory to the whole idea of mediation), but to give everyone an opportunity to be aware of such a possibility ("Guidelines of the Committee" 2010, point B.24, p. 25 and explanatory memorandum B.82, pp. 72-73). It is beyond any doubt that this cannot be applied to mediation involving children. It appears that there are other ways, simpler and less costly for the wronged party, of introducing the principle of comprehensive information on mediation.

In the light of the conclusion that possibilities of conducting mediation with the participation of a victim who is a minor are extremely limited, it is worth remembering that mediation concerning an act that wrongs a child is possible after the child reaches adulthood. An adult who has been affected by a crime when they were under the age of 18 will be fully capable of exercising the rights of the wronged party, including participation in mediation. At this point, it is worth stressing that the research unequivocally indicates that from the perspective of successful mediation, the passage of time is psychologically beneficial (Grodziecka, 2012, p. 202).

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